mission then asserts that this "type" of question is "primarily factual" (Br. Opp. p. 6). If this were the question presented, we would agree that there would be little occasion for review. This Court has repeatedly stated that the "substantiality of evidence on the record as a whole to support agency findings 'is a question which Congress has placed in the keeping of the Courts of Appeals. * * *' " *Federal Trade Commission* v. *Standard Oil Company*, 355 U.S. 396, 401 (1958).

The principal issues raised by this petition involve the meaning of the requirement of "knowledge" under Section 2(f). This is a question of law. In *Automatic Canteen* v. *Federal Trade Commission*, 346 U.S. 61 (1953), this Court in an extensive opinion detailed the proof standards which the Commission must establish in the trial of a charge under Section 2(f).[1] Petitioners' position is that these legal standards have been grossly misapprehended and misapplied by the Court of Appeals and, before that, by the Federal Trade Commission. Review is sought here to correct these legal errors. As recognized in *Automatic Canteen* itself, this Court is "charged with the duty of reviewing the correctness of the standards which the Commission applies and the essential fairness of the mode by which it reaches its conclusions . . ." *Id.* at 81.

---

[1] In view of this single, comprehensive authority, it is astonishing that nowhere in the decision of the Hearing Examiner is there a reference to *Automatic Canteen*, nor, even by indirection, an application of its requirements. His decision reads as if *Automatic Canteen* had never been decided. On appeal, this omission was brought to the Commission's attention by petitioners. The Commission's decision, while acknowledging *Automatic Canteen*, ignores its directives. Affirming, the Court of Appeals has approved what, in effect, was the Commission's position rejected in *Automatic Canteen*.

2. *Automatic Canteen* holds that to establish a violation of Section 2(f) the Commission must prove that the buyer *knew* that the lower price received would have had the effect of creating a likelihood of injury to competition. The court below was correct insofar as it ruled that there must be proof that the price differentials created a reasonable likelihood of injury to competitors (See Pet. 7a). But in a section 2(f) proceeding, the Commission must *further* prove that the buyer had *knowledge* of the likelihood of this effect on competition. Thus, the court below committed plain error when it concluded that "So far as the specific element of discriminatory injury is concerned, the Government's Section 2(f) burden of proof is satisfied by showing price differentials of a kind which would cause or likely cause injury to competitors" (Pet. 8a). In so deciding, the court completely left out the critical knowledge requirement. But as this Court held in *Automatic Canteen*, "the inquiry must be into the buyer's knowledge of the illegality." *Automatic Canteen* v. *Federal Trade Commission*, *supra*, at 73.

The court below misconceived this Court's interpretation of the proof standards under § 2(f). It failed to comprehend that the fact of illegality and the fact of the buyer's knowledge of the illegality are two separate ingredients of the buyer's offense.[2] It assumed,

---

[2] The Attorney General's Report states the two-step proof procedure as follows:

> "To transgress Section 2(f) a buyer not only must obtain an unlawful concession but also must be reasonably aware of its illegality. Conversely, exoneration followed from either a successful showing that the challenged price quotation was not in fact illegal, *or* that the buyer had no reason to know otherwise." (Attorney General's National Committee to Study the Antitrust Laws, p. 194 (1955), citing this Court's decision in *Automatic Canteen*).

erroneously, that once the Commission establishes that the price discrimination had the proscribed anti-competitive effect, then the buyer must have known of this effect at the time of the receipt of the lower price. Needless to say, even today after 25 years of Robinson-Patman enforcement, sellers market at different prices without knowing whether or not they are violating the law. The problem of knowing competitive effect is even more difficult for buyers.

3. *Automatic Canteen* holds that the Commission, as part of its case under § 2(f), must also prove that the buyer *knew* that the seller's price differentials were not justified by any of the defenses provided by the Act. Here the record evidence shows that the petitioners had reasonable grounds to believe that their sellers were protected by the cost justification defense, the good faith meeting of competition defense, and the co-operative exemption under § 4.

On cost justification, the court below made a finding of buyer's knowledge in the face of undisputed record evidence of actual cost savings resulting from the larger quantity purchases and evidence that sellers assured petitioners of the cost justification for the lower prices.[3] All this evidence was ignored by the Court of Appeals. In so doing, the court plainly misapplied the standards of *Automatic Canteen.*

---

[3] In *Automatic Canteen*, this Court noted: "We need not in this case consider the weight that can be attached to affirmative statements by the seller to the buyer that a price was or was not cost-justified, since there were no such statements in this case." 346 U.S. 80, n. 24. The issue is directly raised in this case, however. There is not only evidence of such statements by the sellers to petitioners, but this evidence was wholly ignored below.

On the § 2(b) defense, the court below rejected evidence of the petitioners' knowledge relating to their sellers' good faith meeting of competition defense on the ground that the petitioners bargained for the lower prices. On this point, the court specifically said:

> A buyer earnestly negotiating with a Supplier to obtain from such Supplier the benefit of that Supplier's discount tables already in effect can certainly not urge that he was entitled to assume that the Supplier was extending such price differentials as a means of meeting competition with other Suppliers. (Pet. 13a)

This very argument was rejected by this Court in *Automatic Canteen*. There the Court said.

> The Commission argues that Congress was attempting to reach buyers who through their own activities obtain a special price and that 'knowingly to induce or receive' can be read as charging such buyers with responsibility for what ever unlawful prices result. But that argument would comprehend any buyer who engages in bargaining over price. 346 U.S. at 71-2.

This Court rejected the Commission's arguments as "unsatisfying", pointing out that to so read the statute would put "the buyer at his peril whenever he engages in price bargaining." Id. at 73. Yet, despite this definitive ruling, the Court of Appeals accepted the old Commission position.[4]

---

[4] Regarding the question of whether petitioners knew the prices they received were not exempted by the provisions of Section 4, suffice it to say here that this issue was wholly ignored by the Court of Appeals and the Commission. The scope and meaning of Section 4, including its application to § 2(f), are presented to this Court as matters of first impression.

4. The determination of these legal questions is obviously of great importance to purchasers, particularly small ones, throughout our economy. All buyers naturally aim to secure the lowest possible prices. How far buyers will go in bargaining for lower prices will depend greatly on the manner in which the Federal Trade Commission administers and enforces § 2(f). The basic question here is whether buyers' liability under that section will be governed by the standards of *Automatic Canteen* or the "new" criteria promulgated by the Court of Appeals in this proceeding. If this latter interpretation prevails, so that knowledge of price differentials alone is sufficient to create buyer liability, then there will be no room left for "that sturdy bargaining between buyer and seller for which scope was presumably left in the areas of our economy not otherwise regulated." *Automatic Canteen* v. *Federal Trade Commission, supra.* at 74.

5. Lastly, it should be noted that contrary to the Commission's contention (Br. Opp. pp. 5-6), the denial of certiorari in *American Motor Specialties Co.* v. *Federal Trade Commission*, 278 F. 2d 225 (2nd Cir., 1960), *cert. denied* 364 U.S. 884, is not dispositive of this petition. It should be unnecessary to reiterate that a denial of a petition for a writ of certiorari "imports no expression of opinion upon the merits of the case, as the bar has been told many times" *United States* v. *Carver*, 260 U.S. 482, 490 (1923). In any event, while the petition in *American Motor Specialties* raised a question of proof standards under § 2(f), this was merely one of the five questions presented; the other questions related to such disparate issues as the failure to allege interstate commerce, the conflict with New York's Cooperative Corporations law, and the

admissibility of documentary evidence. Here, different substantive issues are presented involving the basic legal standards to be applied in adjudicating buyer liability under § 2(f).

---

The basic holding of the court below is of major significance in the administration of the Robinson-Patman Act. By virtually reading out of § 2(f) the requirement of knowledge, the decision openly conflicts with the opinion of this Court in *Automatic Canteen* and runs counter to the objectives sought by Congress in enacting the law. The practical result will be to inhibit, if not eliminate, effective price bargaining by buyers with sellers. We submit that the questions presented are serious and of widespread public importance and, therefore, that the petition for a writ of certiorari should be granted.

Respectfully submitted,

DAVID C. MURCHISON
of
HOWREY, SIMON, BAKER &
MURCHISON
1707 H Street, Northwest
Washington 6, D. C.

HILLSMAN TAYLOR
Memphis, Tennessee

FRANK J. TIPLER, JR.
Andalusia, Alabama

*Attorneys for Petitioners*

July 1961